



- (1) Did claimant's permanent and resulting injury arise out of and in the course of her employment with the respondent or from subsequent accidents?
- (2) What is claimant's average weekly wage?
- (3) What is the nature and extent of claimant's disability?
- (4) Is claimant entitled to unauthorized medical?

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the briefs and arguments of the parties, for the reasons expressed below, the Appeals Board finds that the Award of Administrative Law Judge Alvin E. Witwer should be affirmed in all respects.

The Award of the Administrative Law Judge sets out his findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Appeals Board finds the findings and conclusions to be accurate, appropriate and supported by the record. The Appeals Board adopts these findings and conclusions as its own.

(1) Claimant injured her low back unpacking a shipment of textbooks during the week of July 26, 1993 while employed by the respondent. Claimant notified the respondent of her low back injury and received treatment for the injury commencing August 3, 1993 from Dr. Lynn H. Wilson, a chiropractor that claimant had seen on prior occasions. Claimant was released from Dr. Wilson's treatment on September 24, 1993 but her low back continued to be symptomatic. On a number of occasions subsequent to claimant's work-related accident, claimant aggravated or exacerbated her low back while performing activities both at home and at work. However, the testimony of the claimant and Dr. Wilson established that these were temporary aggravations or exacerbations that subsided to the level of her original symptoms.

The Appeals Board affirms the Administrative Law Judge's conclusion that the evidentiary record supports the finding that claimant's present low back complaints and disability are a direct result of her work-related accident and not caused by the subsequent incidents which temporarily aggravated or exacerbated her low back injury.

(2) The Administrative Law Judge found that claimant's average weekly wage on the date of her accident, August 2, 1993, was \$410. The Administrative Law Judge determined claimant's average weekly wage based on claimant's employment contract which was admitted into evidence at the regular hearing. The contract specified that claimant would be paid \$10.25 per hour and that her normal work week would be 40 hours per week.

Respondent argued that claimant's average weekly wage should be \$386.33. Respondent presented evidence through June Betz, clerk of the Board of Education for the school district, who established that claimant was paid for 37.69 hours per week, 52 weeks per year. The 52 weeks per year included 4 weeks of paid vacation and an additional 2 weeks of the year when claimant received a paycheck even though she did not work. Ms. Betz established that the claimant worked a normal work week of 40 hours but was only

paid for 37.69 hours. Claimant was paid less than the actual 40 hours per week that she worked because she received full pay for the two weeks during the year that she did not work or receive paid vacation. Accordingly, the Appeals Board finds that the claimant's average weekly wage is \$410 per week as found by the Administrative Law Judge. See K.S.A. 44-511(b)(4)(B).

(3) The Administrative Law Judge found that claimant was entitled to permanent partial general disability benefits based on the 15 percent functional impairment rating opinion of Dr. David A. Tillema, an orthopedic surgeon, who was appointed by the Administrative Law Judge to perform an independent medical examination. Dr. Tillema was the only physician to issue an opinion in reference to claimant's functional impairment as a result of her low back injury. Claimant remained working for the respondent after her injury at a comparable wage. Accordingly, she was only eligible for permanent partial disability benefits based on functional impairment. See K.S.A. 44-510e(a).

Respondent argued that claimant had a preexisting low back condition and, therefore, her disability should be reduced by the amount of preexisting functional impairment. See K.S.A. 44-501(c). Respondent contended that claimant's disability, should be reduced by 60 percent based on Dr. Tillema's opinion that he estimated claimant's preexisting back condition contributed 30 to 60 percent to her present disability. The Administrative Law Judge refused to reduce claimant's disability finding that Dr. Tillema's opinion was not credible. The Administrative Law Judge found that Dr. Tillema estimated only the amount that claimant's preexisting functional impairment that contributed to her present disability and furthermore did not base his opinion on medical probability. Additionally, Dr. Tillema was hesitant and equivocal when asked to give an opinion of the amount of claimant's preexisting functional impairment. Accordingly, the Administrative Law Judge found that claimant's present disability should not be reduced as the respondent had failed to present credible evidence to prove a preexisting functional impairment. The Appeals Board agrees and affirms the finding of the Administrative Law Judge.

(4) The Appeals Board affirms the Administrative Law Judge's finding that claimant is entitled to the statutory unauthorized medical allowance of \$500 upon presentation of appropriate itemized statements.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Alvin E. Witwer dated July 31, 1995, should be, and hereby is, affirmed in all respects, and all orders contained in the Award are adopted by the Appeals Board as its own.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of April 1996.

---

BOARD MEMBER

---

BOARD MEMBER

---

BOARD MEMBER

c:     Derek R. Chappell, Ottawa, KS  
       Anton C. Andersen, Kansas City, KS  
       Evan H. Ice, Lawrence, KS  
       Alvin E. Witwer, Administrative Law Judge  
       Philip S. Harness, Director